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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

NO.

TIMOTHY C. SHASHATY,

Petitioner

- vs -

STATE OF CONNECTICUT,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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QUESTIONS PRESENTED

1. Did the admission of the defendant's pre-arrest, but post-Miranda, silence deny him due process of law in violation of Doyle v. Ohio and Wainwright v. Greenfield?

2. Have the circuits formulated conflicting standards for measuring the harmfulness of Doyle violations?

3. Was the admission of the defendant's pre-arrest, but post-Miranda, silence harmless error?

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STATE OF CONNECTICUT

The Petitioner, TIMOTHY C. SHASHATY, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Supreme Court of the State of Connecticut entered in this proceeding on August 18, 1987.

OPINION BELOW

The opinion of the Supreme Court of the State of Connecticut is reported at 205 Conn. 39 (1987), and appears in the Appendix hereto. The opinion of the Appellate Court of the State of Connecticut is reported at 8 Conn. App. 387 (1986) and appears in the Appendix hereto.

JURISDICTION

The opinion and decision of the Supreme Court of the State of Connecticut was entered on August 18, 1987. A timely petition for reargument to that Court was denied on September 23, 1987. This petition for certiorari has been filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Did the admission of the defendant's pre-arrest, but post-Miranda, silence deny him due process of law in violation of Doyle v. Ohio and Wainwright v. Greenfield?

2. Have the circuits formulated conflicting standards for measuring the harmfulness of Doyle violations.

3. Was the admission of the defendant's pre-arrest, but post-Miranda, silence harmless error?

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment V:

No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law....

U.S. Constitution, Amendment XIV:

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Timothy C. Shashaty was convicted following a jury trial in the Connecticut Superior Court of the crimes of sexual assault in the first degree and unlawful restraint in the first degree, C.G.S. §§53a-70(a); 53a-95(a), respectively.

According to testimony at trial, Samantha Godo, who was a high school senior in March 1983 attended a party at the home of her friend Emily Lewis. Alcohol and beer were served at the party and Samantha drank between eight and ten 10 ounce glasses of beer. One of the twenty people at the party was the defendant who engaged her in "small talk" and drove her to the store for cigarettes.

Godo became involved in a fist fight with another girl at the party, became

hysterical and was injured. Godo claimed that Shashaty ministered to her after the fight.

When the party broke up, Godo claimed that she, the defendant, Emily and Emily's boyfriend were the only guests who stayed behind. She claimed that she talked to the defendant for half an hour, that he tried to kiss her a few times, but she rebuffed him; she claimed that around 11:30 p.m. she started to walk home alone. She further claimed that Tim Shashaty caught up with her, entreated her to walk along with him, but she continued to rebuff him. She claimed that he began to walk down the street with her, that he picked her up and carried her over his shoulder; she claimed he agreed to put her down if she would walk and hold hands with him. She agreed to

this and they walked hand in hand. She claimed that he picked her up over his shoulder again and, although she was screaming, carried her through the yards of several residences before putting her down on the grass where he held her down, removed her pants and had sexual relations with her. She did not claim any force. After this she walked home; she told Emily she had had a problem, but did not report the incident until the following day when she called the police.

Four days later, on March 10, 1983, two Milford police officers drove to the defendant's home, awakened him and "informed him that his name had come up in an investigation." Lieutenant William Graham asked the defendant to meet him at the police station to discuss the matter; the defendant

agreed, and went to the station that afternoon. At that interview, Shashaty asserted his innocence. After having been given full Miranda warnings, Shashaty made a written statement claiming that he had left the party with his girlfriend, Melissa Junget, Billy McClafferty and Maryann Kopec in Ms. Kopec's car and that he was driven to his house where he went to bed. Prior to signing this typewritten transcript of the account, the defendant was advised of his rights under Miranda v. Arizona and signed a standard waiver form.

On March 23, 1983, the defendant was arrested and formally charged.

At trial, Junget, McClafferty, Kopec and the hostess testified that Shashaty had stayed behind at the Lewis home after the others had departed.

Forensic evidence supported the presence of seminal fluid on the crotch of Godo's underpants, but determined that no pubic or ordinary hair obtained from her were Shashaty's.

Shashaty took the stand in his own defense and testified that he had stayed at the Lewis party, had expected to ride home with Lewis's boyfriend, but when the boyfriend remained at Lewis's house, he left on foot and hitched a ride home. He testified he was picked up by a driver named "Mark" whose last name he never learned. He also testified that when the two detectives came to his house and questioned him shortly after he was awakened, he told them that he had left the party with his girlfriend Melissa Junget and others. He did not tell the truth to the police

because "I was scared....I was afraid and I just figured it would take me out of involvement if I had answered that." (Tr. pp. 250-51, 255) The defendant further testified that because of a serious automobile accident, he suffered chronic low back pain and was unable to lift heavy objects.

On rebuttal, the State was permitted over the defendant's objection to present further testimony from Lt. William Graham, asserting that between the date of the defendant's written statement and the date of his subsequent arrest, the defendant did not make any corrections to his written statement and did not report to the police anything about hitching a ride. Lt. Graham was therefore permitted to place in evidence before the jury at the crucial rebuttal stage of the trial, evidence of the de-

fendant's pre-arrest, post-Miranda silence.

In addition, in its charge to the jury, the Court gave a "missing witness" instruction regarding the defendant's "failure" to call as a witness the driver Mark who he claimed had given him a ride home after the party.

The defendant appealed his conviction to the Appellate Court of the State of Connecticut. In an opinion at 8 Conn. App. 387 (1986), the Appellate Court ruled that the trial court had violated both Mr. Shashaty's Fifth and Fourteenth Amendment rights by allowing the State to present evidence of his post-Miranda silence. The Appellate Court further ruled that the trial court had unlawfully given "missing witness" jury instructions since absolutely no legal basis for such an instruction

existed. The Appellate Court further held that the "missing witness" instruction which was erroneously given did not correctly state the law.

Despite these three errors, the Appellate Court held that the defendant had received a fair trial. The Appellate Court reasoned that the defendant had the burden of showing harmful error in regard to the "missing witness" charge. However, the Appellate Court found that the prosecution had the burden of showing the harmlessness of the error in regard to post-Miranda silence.

Applying both standards, the Appellate Court ruled against the defendant holding that the defendant had failed to show the harmfulness of the missing witness error and that "this case presents one of those

'few instances'...where the [Doyle] error was harmless." 8 Conn. App. at 394.

Following the Appellate Court's affirmance of the trial court judgment, the Supreme Court of Connecticut, upon defendant's petition for certification, agreed to hear his appeal. The Supreme Court of Connecticut agreed with the Appellate Court Court that the trial court had erroneously instructed the jury as follows: "It is the law of the State that the failure of a party to call a witness or witnesses who are within its power to produce entitles you, the jury, to infer that the testimony of such witness or witnesses would be unfavorable to that party.

"In this case, the defendant testified that, after leaving the party ... he hitchhiked and received a ride from a

person whose first name he knew to be Mark. Consistent with the rule I have just stated, you may consider the failure of the defendant to call this person."

The State conceded that it was unwarranted and incorrect as a matter of law for the trial court to give this instruction.

The Supreme Court of Connecticut agreed with the Appellate Court that the erroneous instruction engendered a claim arising under State law and did not, as the defendant claimed, involve any constitutional right. The Connecticut Supreme Court held that the defendant failed to carry his burden of proving harmful error.

However, on the principal issue of the appeal, whether the State can introduce evidence of a defendant's silence after he has received Miranda warnings but prior to

his arrest, the Supreme Court of Connecticut differed with the analysis of the Appellate Court. The Supreme Court of Connecticut disagreed with the Appellate Court which had found that the defendant was in police custody when he gave his false alibi statement. The Supreme Court of Connecticut found that the defendant was not under arrest or otherwise in custody, but declined to rule in this unsettled area of federal constitutional law. Despite the State having conceded at oral argument that it had offered its rebuttal evidence of the defendant's pre-arrest silence both to impeach the defendant's credibility and, substantively, to demonstrate his consciousness of guilt, the Connecticut Supreme Court refused to condemn the use of post-Miranda silence on rebuttal. In

refusing to condemn the State's use of pre-arrest, post-Miranda silence against the defendant, the Supreme Court of Connecticut obviated the need to reach this issue by holding that the admission of this silence was harmless beyond a reasonable doubt.

The Supreme Court of Connecticut denied Petitioner's motion to reargue on the grounds raised herein.

REASONS FOR GRANTING THE WRIT

I

THE ADMISSION OF THE DEFENDANT'S PRE-ARREST, BUT POST-MIRANDA, SILENCE DENIED HIM DUE PROCESS OF LAW IN VIOLATION OF DOYLE V. OHIO AND WAINWRIGHT V. GREENFIELD.

Despite the faulty reasoning of the Connecticut Supreme Court, there can be little doubt that the admission of pre-

arrest, but post-Miranda silence against the defendant ran afoul of the rule of Doyle v. Ohio, 426 U.S. 610 (1976), and deprived the defendant of fundamental fairness.

"Miranda warnings inform a person that he has the right to remain silent and assure him, at least implicitly, that his subsequent decision to remain silent cannot be used against him." Jenkins v. Anderson, 447 U.S. 238, 240 (1980).

The question of permissible uses of a defendant's silence does not devolve on the time of the silence, on whether it was post or pre-arrest silence, or on whether the defendant was in or out of custody. The sole determinative of the admissibility of silence depends on whether silence had been sustained as a result of government assur-

ances that the silence would not be used against the defendant. "Doyle bars the use against a criminal defendant of silence maintained after receipt of governmental assurances." Anderson v. Charles, 447 U.S. 404, 408 (1980) As this Court made crystal clear in Anderson v. Charles, Doyle held simply "that the Due Process Clause of the Fourteenth Amendment prohibits impeachment on the basis of a defendant's silence following Miranda warnings." Id., 407.

While Anderson and Jenkins compel the conclusion that all post-Miranda silence, whether custodial or non-custodial, is covered by the Doyle rule, the confused dicta of the Connecticut Supreme Court in trying to resolve the case at bar, underscores the need for this Court to explicitly rule on this open question. (See

Appendix pp. 21b-23b) The narrow reading by the Connecticut Supreme Court of this Court's decision in Wainwright v. Greenfield, 474 U.S. 284 (1986) suggesting that only arrested persons are entitled to Doyle protections, demands that this Court resolve this confusion. This Court must explicitly address the question of what precipitating events trigger Doyle rights.

II

THE CIRCUITS HAVE ADOPTED CONFLICTING STANDARDS FOR MEASURING THE HARMFULNESS OF DOYLE VIOLATIONS.

In deciding that the admission of post-Miranda silence against Timothy Shashaty was harmless error, the Connecticut Supreme Court purported to rely on the formulation of the Fifth Circuit in Chapman v. United States, 547 F.2d 1240, 1250 (5th Cir.),

cert. denied, 431 U.S. 908 (1977): "When there is but a single reference at trial to the fact of defendant's silence, the reference is neither repeated nor linked with defendant's exculpatory story, and the exculpatory story is transparently frivolous and evidence of guilt is otherwise overwhelming, the reference to defendant's silence constitutes harmless error."

The circuits have uniformly applied the "harmless beyond a reasonable doubt" standard of Chapman v. California, 386 U.S. 18 (1967) to Doyle violations. United States v. Elkins, 774 F.2d 530 (1st Cir. 1985); Hawkins v. LeFevre, 758 F.2d 866 (2d Cir. 1985); United States v. Cummiskey, 728 F.2d 200 (3d Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 1869 (1985); Williams v. Zahradnick, 632 F.2d 353 (4th Cir.

1980); Martin v. Foltz, 773 F.2d 711 (6th Cir. 1985); United States ex rel. Miller v. Greer, 789 F.2d 438 (7th Cir. 1986); United States v. Disbrow, 768 F.2d 976 (8th Cir. 1985): United States v. Ortiz, 776 F.2d 864 (9th Cir. 1985); United States v. Remigio, 767 F.2d 730 (10th Cir. 1985); United States v. Ruz-Salazar, 764 F.2d 1433 (11th Cir. 1985). There is little doubt of the vitality of the Doyle doctrine, particularly in light of this Court's strong application of the doctrine last term in Wainwright v. Greenfield, supra.

Despite an across the board interface of Chapman and Doyle, the Circuits have not standardized the measure of harmfulness in relation to Doyle violations. In Velard v. Shulsen, 757 F.2d 1093 (10th Cir. 1985) the

Tenth Circuit held that a Doyle violation can never be harmless when the case comes down to the word of the the key prosecution witness against the word of the defendant; In United States ex rel. Miller v. Greer, supra, the Seventh Circuit rejected a finding of harmless error analysis based on the factors of duration of the comment on silence, the corroboration of damaging testimony, and a curative instruction. The Seventh Circuit demanded that "overwhelming evidence" of guilt is necessary "to overcome constitutional error such as a Doyle violation." The Fifth Circuit has devised several different standards. See Chapman v. United States, supra and United States v. Meneses-Davila, 580 F.2d 888 (5th Cir. 1978); Alderman v. Austin, 695 F.2d 124,

125 (5th Cir., Unit B, 1983) The Eleventh Circuit, in Matire v. Wainwright, 811 F.2d 1430 (11th Cir. 1987) seems to adopt the Meneses-Davila test: 1) when the prosecution links silence to the exculpatory story, reversible error results even if the story is transparently frivolous; 2) when the prosecutor does not directly tie the silence to the exculpatory story and the jury is never told that such silence can be used for impeachment purposes, reversible error results if the exculpatory story is not totally implausible or the indicia of guilt is not overwhelming; 3) a single reference to silence, not linked to the defendant's story constitutes harmless error when the exculpatory story is transparently frivolous, and evidence of guilt is otherwise overwhelming. The Tenth and

the Fourth Circuits have considered the following factors determinative of harmfulness: The use and genesis of the silence testimony, the quantum of other inculpatory evidence, the intensity and frequency of the reference, and the opportunity for curative instruction or mistrial. United States v. Harrold, 796 F.2d 1275, 1280 (10th Cir. 1986); United States v. Remigio, supra; Williams v. Zahradnick, supra.

Given the alarming frequency of Doyle violations (as evidenced by the sheer number of reported decisions) this Court should adopt a strict harmless error standard not only to assure fundamental fairness and integrity in the criminal justice system, but also to provide a cogent harmless error analysis toward the

promotion of uniformity among the circuits.

III

THE ADMISSION OF THE DEFENDANT'S PRE-ARREST, BUT POST-MIRANDA, SILENCE WAS NOT HARMLESS ERROR.

In this case, the trial in its final analysis amounted to nothing more than a contest pitting the comparative credibility of the alleged victim against the credibility of the Petitioner. Petitioner's credibility was crucial to the issue of reasonable doubt. It is undoubtedly true, as was observed below that Petitioner's credibility had been undermined to some degree by his admitted false exculpatory statement to the police, yet each of the three errors committed by the trial court served but one purpose and that purpose was to undermine further the Petitioner's

credibility.

The Connecticut courts purported to rely on the harmless error formulation of Chapman v. United States, supra. However, as has been noted above, the Fifth Circuit has been loathe to slavishly follow Chapman. Nevertheless, even if Chapman were still good law, the application of the Chapman formulation to the case at bar clearly demonstrates that the Doyle error committed here was egregiously harmful and fundamentally effected the fairness of the trial.

There was not a "single reference" to the Doyle silence but several pages of testimony presented at the most crucial stage of the trial which represented the State's entire rebuttal case. The reference to silence was expressly linked with defendant's exculpatory story -- indeed,

its whole purpose was to rebut that exculpatory story; the exculpatory story manifestly was not "transparently frivolous"; and evidence of guilt was anything but overwhelming.

The harmless error standard should be evenhanded and uniform throughout the Circuits, the several states and in Connecticut. The misapplication of the harmless error doctrine to the case at bar, represents an egregious mischaracterization of law and undermines the integrity of the trial and appellate process.

CONCLUSION

Fundamental fairness demands that a writ of certiorari issue to review the judgment and opinion of the Connecticut Supreme Court.

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